In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1201

EMIL TUCKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1970. The petition for a writ of certiorari was filed on January 6, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court properly admitted into evidence statements made by petitioner.

415-888—71

STATEMENT

After a jury-waived trial in the United States District Court for the Central District of California petitioner was convicted of two counts of interstate transportation of stolen securities in violation of 18 U.S.C. 2314,[1] and sentenced to concurrent terms of three years on each count. The court of appeals affirmed (Pet. App.).

1. The evidence showed that on the evening of March 16, 1961, the residence of John H. O'Blenis and his daughter, Mrs. Barbara Bryson was burglarized. Among the items stolen were securities of an approximate value of $450,000.00 (Tr. 9, 10, 11). On September 22, 1970, the securities appeared at the Los Angeles, California, brokerage firm of E. F. Hutton and Company (Tr. 39). One Wilson, a regular customer of the brokerage firm, was contacted by a C. W. Deaton, who related that an attorney in New York was attempting to sell his deceased brother's securities privately in an effort to avoid New York State inheritance tax (Tr. 99). On September 22, Wilson met with petitioner and drove to the brokerage firm where $26,000 in securities were sold. Wilson kept 15% of the proceeds as his commission (Tr. 102, 104). Deaton and one George Bell were to receive a percentage of Wilson's payment as a finder's fee or commission (Tr. 188). After this "test run", another transaction was set for a week later (Tr. 108). Wilson met with petitioner and went to the brokerage firm where petitioner

[1] We are lodging with the Clerk the transcript of trial (Tr.).

turned over securities to Wilson for sale (Tr. 110). The sale was not consummated that day. That evening, Marc Frederic, Wilson's broker with E. F. Hutton, telephoned Wilson and informed him that "something was bothering him about the stock" (Tr. 111).

The next morning at E. F. Hutton, Wilson learned that the securities had been stolen (Tr. 115). He informed petitioner that the FBI had been called (Tr. 115). Petitioner said that he felt a mistake had been made (Tr. 115). Later that evening petitioner asked Wilson to retrieve the securities from E. F. Hutton and Company. Wilson replied this was not possible as the FBI had been called in (Tr. 119). The next day, petitioner returned to New York under the name of E. Tippett (Tr. 247).

In a statement to FBI agents (discussed below) petitioner said that one Dalton Smith had contacted him and had asked him to sell some stock belonging to a friend. Smith wanted petitioner to conduct the sale so that the paying of inheritance tax could be avoided (Tr. 229). He indicated that an associate of his, one Jesse White would contact petitioner later to conclude the arrangements (Tr. 230). Subsequently, petitioner met with White and received a list of the securities purporting to be of total value of about $300,000.00 (Tr. 230). The status of the securities was "checked out" by a friend of petitioner, who told him that the stocks were all right (Tr. 233–234). Petitioner related that he had been in contact with C. W. Deaton, who said that he had a buyer in California, namely, Wilson (Tr. 234–235). Petitioner subsequent-

ly told White in New York that he had a buyer (Wilson) in California who wanted a 15% commission, and that White, Smith and petitioner should get 25%, with the remainder to go to the principals (Tr. 236). He then related that he flew to Los Angeles, met with Wilson and completed the first transaction at the E. F. Hutton brokerage company (Tr. 237–238). Petitioner related the events leading up to the second transaction which, petitioner explained, was not completed because it was revealed that the securities had been stolen and that the FBI had entered upon an investigation (Tr. 239–248).

2. The issue raised by petitioner concerns the admissibility of his statements to the agents. The judge heard testimony on this issue before admitting the statements into evidence. The following facts were established:

Petitioner was indicted on the instant charges in October 1969. He had retained counsel when he pleaded not guilty in November 1969, and was released on bail. On December 15, 1969, David Nissen, an Assistant United States Attorney in charge of the investigation of organized crime in Los Angeles, received a call from a government attorney in Miami to the effect that petitioner had offered to supply information about some people in the Los Angeles area. One name mentioned was Dalton Smith, in whom Mr. Nissen was interested (Tr. 211–217). When petitioner telephoned Mr. Nissen a few days later he referred to the Los Angeles indictment, but Mr. Nissen made clear that he knew nothing about the case (Tr. 218).

Mr. Nissen told petitioner that he could give him no assurance that his cooperation would be to any advantage to him, particularly with respect to his case (Tr. 218). Mr. Nissen said that if petitioner cooperated, the fact would be brought to the attention of the court should petitioner be convicted (Tr. 218). Mr. Nissen suggested that petitioner should bring counsel with him, but petitioner said that he had spoken with his counsel and that this was not necessary (Tr. 218; see Tr. 219–220).

On December 22, when petitioner was talking with two FBI agents, he again talked briefly with Mr. Nissen by telephone. He again asked what benefit he would derive, and was again informed that any help furnished would be brought to the attention of the court if petitioner was convicted. Upon petitioner's query whether that would be of benefit to him, Mr. Nissen replied, "[W]ell, it certainly couldn't hurt" (Tr. 221). Before talking with the FBI agents on December 22, petitioner signed a waiver of rights form.

After petitioner made the statement summarized above, the FBI agents asked him whether he had any transactions with Dalton Smith and Louis Greenberg in relation to Coca-Cola stock sold through a brokerage firm in New York, Coss & Company (Tr. 249). Petitioner said that he knew about such a transaction but he was involved only in the collection of money (Tr. 249). On January 12, 1970, petitioner again called Mr. Nissen and indicated that he wanted to "finish the interview" (Tr. 222). He met with Mr. Nissen and two agents of the FBI on January 16, 1970, at Mr.

Nissen's office (Tr. 223). Petitioner indicated that before he signed a waiver of rights form he wanted to "get a few things straight" (Tr. 223). He wanted "some promise or some assurance of what you are going to do for me" (Tr. 224). Again, Mr. Nissen indicated the government's policy that if he cooperated, such "cooperation would be made known to the court" (Tr. 224). Petitioner stated that that was not adequate. He was informed that "[T]hat is all we can and will do for you. If that is not adequate, you can leave" (Tr 224). Petitioner remained for approximately an hour thereafter, attempting to secure further assurances, When they were not forthcoming, he departed (Tr. 225).

On January 20, 1970, petitioner telephoned Mr. Nissen and indicated that he was prepared to cooperate, but that again he wished an assurance (Tr. 226). Mr. Nissen again reiterated the government's policy. An appointment was made for the 26th of January but was not kept by petitioner (Tr. 226).

ARGUMENT

The evidence presented shows that petitioner initiated confrontations with the agents freely and voluntarily after consultation with his attorney. Petitioner made his statement after being fully advised as to his constitutional rights and after signing a waiver of those rights. Petitioner's repeated attempts to secure benefits for his cooperation clearly establish the motivation for his action. Since petitioner was warned of his right to the presence of counsel and was aware

that he was talking to a government agent, the decision in *Massiah* v. *United States*, 377 U.S. 201, is inapplicable.

Petitioner argues that his statement was involuntary because of a statement made to him before the FBI interview by Assistant United States Attorney Nissen. Nissen testified that he reiterated to petitioner that, if he cooperated, that fact would be called to the attention of the court if petitioner was convicted. Petitioner then asked whether that would be of benefit to him and Mr. Nissen replied, "[W]ell, it certainly couldn't hurt" (Tr. 221). It is evident, in context, that Nissen's remark referred only to the fact that the report to the court (if petitioner were convicted) "couldn't hurt".

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

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